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SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1905.

NO. 163

EAU CLAIRE NATIONAL BANK,
PLAINTIFF IN ERROR.

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, BANKRUPT,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Wisconsin.

Brief of Plaintiff in Error on Motion of Defendant in Error to Dismiss Writ.

BURR W. JONES,
JAMES WICKHAM,
FRANK R. FARR,
Counsel for Plaintiff in Error.

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1905.

NO. 511.

EAU CLAIRE NATIONAL BANK,

PLAINTIFF IN ERROR.

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, BANKRUPT,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Wisconsin.

Brief of Plaintiff in Error on Motion of Defendant in Error to Dismiss Writ.

STATEMENT OF THE CASE.

The defendant in error, as trustee of the estate of John H. Young, a bankrupt, brought suit in the circuit court of Eau Claire County, Wisconsin, against the plaintiff in error to recover $35,000.00, the alleged value of certain logs and lumber that had been owned by Young, the bankrupt, which property it was alleged the Bank received as a preference when Young was insolvent, within four months prior to the adjudication in bankruptcy and contrary to the provisions of the bankrupt law. The Bank demurred to the trustee's complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The trial court over-ruled the demurrer. The Bank then answered, admitting the adjudication in bankruptcy and the appointment of the trustee. It alleged that Young had executed and delivered to the Bank certain chattel mortgages on a portion of the logs and lumber in

question, that the logs and lumber were sold by Young in March, 1902, to the Waters Clark Lumber Company, including certain logs not covered by the Bank's mortgage and that a portion of the proceeds of this sale was paid to the Bank to discharge certain liens it held against the property. The answer also alleged that the mortgages were given in good faith and for a valuable consideration and "that neither of said mortgages, nor the payments made to the defendant as aforesaid, were made, given or received for the purpose of giving the defendant a preference over other creditors of said Young, contrary to the provisions of the bankruptcy law." The trustee based his right to recover on the provisions of the bankruptcy act. The Bank defends, basing its right to hold what it received, and its immunity from liability, on the provisions of the Bankruptcy Act. The Bank specially claimed in its answer that the mortgages and payments it received, were not given or received in violation of the provisions of this Federal statute. (Record 12-13).

The case was tried before the court and a jury. A special verdict was rendered covering some of the issues in the case (Record 15). Some questions of value were decided by the court, but most of the questions in the case were determined by the undisputed evidence upon which no findings were made, either by the court of jury. Judgment was entered in the trial court on September 18, 1903, in favor of the trustee for $6,254.99, with interests and costs, amounting in all to $6,873.77. Both parties appealed from this judgment to the supreme court of the state of Wisconsin, where the judgment was affirmed on both appeals on June 23, 1905. To reverse which judgment the Bank sued out this writ or error.

The jury decided in substance that at the time the bankrupt gave the mortgages to the Bank and at the time he sold the logs and lumber to the Waters Clark Lumber Company, that he was insolvent, that Young intended to give a preference, and that the Bank had reasonable cause to believe that a preference was intended (Record 15 to 17). The court found that the lumber which was included in the Bank's mortgage and sold to the Waters Clark Lumber Company was worth $3,452.85, and that a note for that sum and value was given by the Waters Clark Lumber Company to Young and by Young transfered to the Bank; that the Cadott logs included in the Bank's mortgage and sold by the bankrupt to the Waters Clark Lumber Com-

pany was worth $10,077.84; that the Up River logs sold by Young to the Waters Clark Lumber Company, and which were not included in the Bank's mortgage, were worth $11,055.84, and that a note which the evidence shows was given as the net proceeds of the sale of both quantities of logs over and above certain labor liens, (the note having been given by the Waters Clark Lumber Company to Young and by him transferred to the Bank) was worth $2,508.14 (Record 20).

The allegations of the complaint to the effect that in the sale of the logs and lumber the Waters Clark Lumber Company acted as trustee or agent of the Bank, are not sustained by any evidence, but on the contrary, the evidence shows that these allegations were not true. Findings 3 and 4 of the special verdict are ambiguous on this subject, but both the trial court (Record 398) and the state supreme court held that there was no evidence to sustain these allegations. The state supreme court in its opinion assumed that the Up River logs were included in the Bank's mortgage. In this the court was mistaken. There is no evidence to sustain such an assumption. There is no claim that the evidence sustains such an assumption. The evidence is all the other way (Record 63, 64, 40, 84, 310, 388). There is included in the judgment against the Bank $1,335.62, proceeds of the sale of the Up River logs (Record 38, 30, 374, 94, 95). At the time of the transfers in question, the Bank held notes against Young on which there was due with interest and including $700.00 on non-lienable time checks, $23,648.52 (Record 104, 206, 423, 430). Of this amount the Bank collected by virtue of the transfers alleged to constitute a preference $6,254.99, for which judgment was rendered against it, or about 26½ per cent of the Bank's claim. All other unsecured debts that Young was then owing, and for which claims were afterwards filed in the bankruptcy court, amounted to $7,948.81 (Record 98, 99, 143 to 147).

There is some conflict in the evidence as to what debts of Young the bank had notice of at the time of these transfers, but giving the trustee the benefit of all evidence in his favor on this question, the sum total of the claims of all other creditors that the Bank had notice of at this time, which could in any manner be affected by the alleged preference, or by any bankrupt proceedings was $7,406.90. According to the undisputed evidence, the Bank then had information which its officers believed, and were justified in believing, that Young had property available for the payment of the claims of other

creditors in at least the sum of $14,680.00. If Young then had property to the amount of $1,962.82 it would have been sufficient to pay other creditors of which the Bank had notice, 26½ per cent of this $7,406.90, or a percentage equal to that collected by the Bank.

Young's principal creditor aside from the Bank was Sallie F. Moon, whose claim was filed and allowed in the bankrupt court at $5,360.14 (Record 263). The claim of W. S. Monroe was filed and allowed in the bankruptcy court at $25.00 (Record 56). Both Sallie F. Moon and W. S. Monroe received unlawful preference from the bankrupt within four months prior to the adjudication. The amount paid to Sallie F. Moon on April 24, 1902, was $1,059.86 (Record 264. 153). The amount paid to Mr. Monroe was $1,672.05 (Record 175 to 177). If the claims of Sallie F. Moon and W. S. Monroe were deducted from the total amount of the debts of the bankrupt which he was owing at the time of the transfer in question, (these claims not being provable under the bankrupt law), the sum total of all other debts which could be affected by the alleged preference, is $2,523.67.

If the trustee represents the creditors, and if the recovery should be limited to the amount necessary to pay other creditors in full who have provable claims, then any judgment in excess of $2,523.67, with interests and costs, is excessive.

At the time of the transfers in question, Young was owing debts to the amount of several thousand dollars to workmen and servants for wages earned within three months prior to that time, which claims were entitled to priority under the bankrupt act. Besides, these claims were under the Wisconsin Statutes liens upon the logs and lumber. Time checks for a portion of these claims were held by the Bank. The trial court charged the jury on the question of whether or not a preference has been given, that the creditors were all creditors of the same class (Record 384). Due exception was taken to this charge (Record 390, 391). The state supreme court held that there was no error in this charge, for the reason that it was immaterial to the Bank whether or not creditors were creditors of the same class.

The plaintiff in error filed with its application for the writ of error under Section 997 of the United States Statutes an assignment of errors as follows:

(Title)

ASSIGNMENT OF ERRORS.

Now comes the defendant, the Eau Claire National Bank, in the above entitled action and in connection with its petition for a writ of error makes the following assignment of errors and avers that in the record and proceedings in said action and in the judgment therein, there is manifest error to the great damage of the defendant in this, to wit:

First. That the supreme court of the state of Wisconsin erred in determining that the plaintiff's complaint therein stated a cause of action, and in refusing to reverse the judgment rendered in plaintiff's favor in the circuit court of Eau Claire County, Wisconsin, for the failure of said complaint to state facts sufficient to constitute a cause of action.

Second. That said supreme court of the State of Wisconsin erred in determining that the defendant, Eau Claire National Bank, was liable in said action for the value of the logs and lumber described in the plaintiff's complaint to the extent of the chattel mortgage interest of the defendant therein.

Third. That said court erred in determining that the defendant was liable in said action for having received as a preference, contrary to the provisions of Section 60a and Section 60b of the Bankrupt Act of July 1, 1898, as a portion of its chattel mortgage interest in said logs, the sum of $1,335.62 as the proceeds of the sale of the portion of said logs known as the "Up River logs," on which logs said defendant never held any chattel mortgage and which logs were never transferred to said defendant.

Fourth. That said court erred in determining that the defendant was liable in said action for the value of those certain notes and moneys it had received for which the judgment in said action was rendered against it, as a preference, under the provisions of said Bankrupt Act, although the plaintiff trustee had not elected to avoid such preference by bringing suit to recover the same and had not elected to avoid such preference in any manner whatever.

Fifth. That said court erred in determining that in order to ascertain whether or not the defendant was liable for having received a preference under the provisions of said Bankrupt Act, it was immaterial whether or not the defendant and the other creditors of the bankrupt were creditors of the same

class, and said court erred in refusing to reverse said judgment because of the error of said circuit court in charging the jury that all the creditors of said bankrupt were creditors of the same class.

Sixth. That said court in determining that the defendant had reasonable cause to believe that a preference was intended erred in the construction of said Bankrupt Act in the following respects:

(a) In determining that where the effect of the enforcement of a transfer from an insolvent debtor is to enable any of his creditors to obtain any portion of his debt, and that transfer is followed within four months by the commencement of bankruptcy proceedings, that such a transfer would necessarily enable such creditor to obtain a greater percentage of his debt than other creditors of the same class and would constitute a preference within the meaning of said Bankrupt Act;

(b) In determining that although the effect of the enforcement of the transfer in question did not operate to give the defendant a greater percentage of its debt than other creditors of the same class, that never-the-less such transfer constituted a preference within the meaning of said Bankrupt Act;

(c) In determining by such rules of construction of said Bankrupt Act that the evidence was sufficient to sustain the finding that the defendant had reasonable cause to believe that a preference was intended, whereas under a proper construction of said Bankrupt Act it appears by the uncontroverted evidence that said defendant did not have reasonable cause to believe that a preference was intended.

Seventh. That said court erred in determining that the defendant having received a preference which was voidable by the trustee, was for that reason liable in said action for the full value of such preference so received in an amount in excess of what was necessary to pay all the other creditors of said bankrupt.

Eighth. That said court erred in determining that the defendant was liable to the plaintiff trustee for moneys required by said trustee to pay claims of fictitious creditors whose claims were not proven by the evidence and claims of creditors who had themselves received preferences and in giving judgment against defendant therefor.

Ninth. That said court erred in refusing to limit the recovery against the defendant to such sum as should be sufficient after the payment of expenses and costs, to pay all the other

creditors of the bankrupt whose claims were provable and proven and entitled to be allowed under the provisions of the Bankrupt Act.

Tenth. That said court erred in affirming the judgment rendered against the defendant in said action, and in refusing to reverse said judgment.

Eleventh. That said court erred in refusing to determine that the defendant was entitled to judgment and in refusing to direct judgment to be entered in its favor."

Substantially all the questions involved on the Bank's appeal to the state supreme court were Federal questions involving the construction of the Bankrupt Act, and involving the right and immunity of the Bank thereunder. These questions were all fully argued in the briefs filed on the Bank's behalf in the State Supreme Court, both in the original briefs and in the briefs filed in support of the motion for a rehearing. These questions were passed upon in the opinion of the state supreme court and were all decided adversely to the Bank, the plaintiff in error. Most of the questions are directly mentioned in the opinion.

The question of the right of the trustee to recover more than the amount sufficient to pay the claims of other creditors in full and the question of the right of the trustee to recover for claims of creditors who had themselves received preferences and whose claims were filed and allowed in the bankruptcy court contrary to the provisions of the Bankrupt Act, were questions that were raised in the state supreme court by the original printed briefs before the motion for a rehearing was made, and although not expressly mentioned in the opinion, were necessarily by the affirmance of the judgment, decided adversely to the plaintiff in error.

QUESTIONS INVOLVED.

FIRST. The suit is brought by the trustee to recover an alleged preference. The right of the Bank to retain what it received by the transfers and its immunity from liability as well as the right of the trustee to recover, depends on the Bankrupt Act.

The complaint contains no allegation that creditors had filed any claims in the bankruptcy court, and does not allege any facts showing what amount, if any, it is necessary for the trustee to recover in order to pay claims of creditors that had

been filed or allowed in the bankruptcy court. The question of whether or not the trustee represents creditors and whether or not the trustee can recover a voidable preference not necessary to pay claims of creditors, is a Federal question. The Bank demurred to the complaint on this ground, among others, The trial court over-ruled the demurrer and due exception was taken (Record 34). The ruling on this demurrer was reviewed by the decision of the state supreme court and decided adversely to the Bank, the plaintiff in error. The state supreme court in passing on this question said: "Counsel for defendant further claims that the complaint is defective in not alleging that any creditor had filed a claim in the bankruptcy proceedings, or any facts showing that it was necessary to recover the alleged preference." The court then quoted Section 60b of the Bankrupt Act and said: "No condition precedent to the right of the trustee to recover such property is found in the statute as will be seen and obviously courts cannot legitimately engraft any upon it."

The state supreme court in its opinion on this subject, as well as in its decision in refusing to hold that the judgment was excessive, decided that the trustee in bankruptcy was authorized under Section 60b of the Bankrupt Act to recover the full amount of a voidable preference without regard to the question of the amount of debts of the bankrupt and without regard to the question of what amount, if any, of such voidable preference was necessary to be used to pay the claims of other creditors. The state supreme court refused to hold the proposition contended for by counsel for the Bank, that the trustee represented the creditors, that the recovery could be had only for the benefit of the creditors, and that a voidable preference could not be recovered from one creditor who had not filed his claim in the bankrupt court merely for the purpose of returning it to the bankrupt.

SECOND. The suit was brought to recover the value of logs and lumber which the complaint alleged the bank had received as a voidable preference.

The proof showed that the Bank had not received any logs or lumber; that it did at one time have a chattel mortgage on a portion of the logs and lumber, but that when the property was sold the mortgages were released, and that the Bank received certain notes and money as the proceeds of that sale. Judgment was recovered for these proceeds. It was contended by counsel for the Bank that a voidable preference is not nec-

essarily void, but becomes void only when the trustee elects to avoid it, that even if the Bank received a voidable preference consisting of notes and moneys, the trustee never elected by suit or otherwise to avoid that particular preference; that the bringing of suits for logs and lumber which the Bank did not receive nor convert to its own use, was not an election to avoid a preference consisting of promissory notes; that it was not a mere question of pleading or of variance between the pleading and the proof, but that the objection went beyond that and went to the right of the plaintiff to recover judgment under the provisions of the Bankrupt Act. The plaintiff trustee objected to the judgment he received. That judgment was not granted on the trustee's motion, but on the court's own motion against trustee's objection. The trustee appealed to the state supreme court, claiming that he had the right to recover the full value of the logs and lumber for which he sued. The trustee therefore did not elect to avoid the preference.

The rule that a voidable preference is valid in all respects until the trustee elects to avoid it, is fully and ably discussed in *Swartz v. Frank* (Mo.) 82 S. W. 60.

This is necessarily a Federal question. Both the trial court (Record 398) and the state supreme court held that the Waters Clark Lumber Company was not agent for the Bank, that there was no evidence to sustain such claim and that the Bank did not receive the logs or lumber, but the state supreme court held that because the Bank received some of the proceeds of the sale of property on which it had held a chattel mortgage, that it in effect received a portion of the logs and lumber which were covered by the mortgage.

If the Bank received a preference, it is a Federal question under the Bankrupt Act as to what that preference consisted of, as to whether or not the preference consisted of logs or lumber or notes and moneys. It is also a federal question whether or not the trustee can sue for one preference and recover for another preference which he has not elected to avoid. The Federal statute determines what it is that constitutes the preference. The trustee has no right to determine what shall constitute the preference. Where a preference has been received, the trustee's only right of election is to determine whether or not that particular preference shall be avoided. He has no right to decide whether one kind of property or another kind of property shall constitute the preference.

THIRD. There is included in the judgment against the

plaintiff in error, the sum of $1,335.62, the net proceeds of the sale of the Up River logs on which the Bank never held any mortgage, and which logs were never transferred to the Bank. The state supreme court apparently supposed that the Up River logs were included in the chattel mortgage.

Is the Bank liable under the Bankruptcy Act for having received from Young this $1,335.62 in a note of the Waters Clark Lumber Company, in a suit brought to recover the value of logs and lumber in which the Bank never had any claim as purchaser, mortgagee, or otherwise, assuming that this $1,335.62 was received as a voidable preference, where the preference had never been avoided by the trustee? This is a Federal question. Even if these logs had been included in the mortgage as the state supreme court assumed, it is still a Federal question.

FOURTH. The question raised by the fourth assignment of error is sufficiently covered by what has already been said.

FIFTH. At the time of the transfers in question, Young was indebted in the sum of several thousand dollars for wages of servants who had worked on the logs and lumber within three months prior to that time. Time checks for some of these labor claims were held by the Bank, but there was a large amount of such labor claims which the Bank did not hold (Record 374). These labor claims were all paid out of the proceeds of the sale of the Up River and Cadott logs. Most of the notes and time checks held by the Bank against Young contained the endorsement of other parties. The trial court in submitted the case to the jury as to whether or not the transaction constituted a preference, charged the jury that the creditors were all creditors of the same class. The Bank duly excepted to this charge (Record 390-391). The correctness of this charge was argued in the state supreme court and that court held that there was no error in the charge, on the ground that it was immaterial to the Bank whether or not creditors were creditors of the same class.

The state supreme court was clearly wrong in this ruling because by the plain provisions of the Bankrupt Act, a transaction cannot constitute a preference unless it enables one creditor to obtain a greater percentage of its debts than other creditors of the same class. Creditors in a subsequent class, or lower class, would not be entitled in any event to receive any part of their claims until the creditors in a prior class were paid. It therefore becomes important in the first instance to

determine to what class the creditors belonged. If the jury had been charged as they should have been, that these claims for wages were claims of creditors of a higher class, their verdict would probably have been the other way. If the claims of creditors holding notes secured by indorsement, are creditors of a different class than creditors holding unindorsed paper, as was held in *Doyle v. Milwaukee National Bank*, 116 Fed. 295, the charge was also erroneous on that ground.

SIXTH. It was contended by counsel for the Bank both in the trial court and in the supreme court, that under a proper construction of the word "preference" as defined by the Bankrupt Act, that there was no evidence sufficient to justify the finding that the Bank had reasonable cause to believe that a preference was intended.

The state supreme court held that the evidence was sufficient to prove that Young was insolvent and that the Bank was chargeable with notice thereof, and held that those two facts being shown, to wit, the insolvency of Young and notice thereof by the Bank, that it necessarily followed that if the Bank received *any percentage whatever* of its claim, that that necessarily and as a matter of law constituted a voidable preference. The question is therefore not a question of fact, but a question of law. The Bank had a large claim, several times larger than all other creditors combined. It collected 26½ per cent of its claim. From all the information that the Bank had, Young had plenty of property left to pay all other creditors in full, although he was insolvent and unable to pay the balance of the Bank's claim in full. Such a transaction by the plain provisions of the Bankrupt Act does not constitute a preference that could be avoided by the trustee. The finding of fact of the jury, unsupported by any evidence, was not binding on the state supreme court, and it was the duty of that court, as well as its uniform practice in such cases to set aside such finding. The state supreme court refused to set aside the finding, basing its decision on an erroneous view of the Bankrupt Act. The opinion of the state supreme court when read in the light of the evidence, which is plain and explicit on this subject, makes it clear that the state supreme court sustained this finding on the ground held by that court that the word "preference" means the collection by a creditor of *any portion* or *any percentage* of the creditor's claim against his insolvent debtor. It cannot be seriously contended that the finding could be sustained on any other theory.

The state supreme court says in its opinion, "It is claimed however by counsel for defendant, that unless the enforcement of the mortgages would operate to give defendant a greater percentage of its debt than other creditors of the same class would receive, the mortgages did not amount to a conveyance of property, or in other words a preference within the meaning of the Bankrupt Act. We do not so understand the law. The federal statute renders void any preference given under the circumstances specified therein, and as we have seen, gives the trustee in bankruptcy the right to recover any property, or its value, conveyed in violation of such act."

The Bankrupt Act of 1898 is different in this respect from the Bankrupt Act of 1867. Under the Bankrupt Act of 1898 there is no room for the construction placed upon it by the state supreme court. By that construction the words "and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class" must be stricken out, and in their place must be substituted the words "and the effect of the enforcement of such transfer will be to enable any of his creditors to collect any portion whatever of his debt." This presents a Federal question.

If the plaintiff in error is right upon its construction of this provision of the Bankrupt Act, it should have that right determined by this court. It would be an anomalous, as well as an unfortunate situation, for the plaintiff in error, if not being liable under the law or evidence, yet must pay this judgment on the ground that there is no court that can give it relief. The state supreme court refused to give relief ,basing its decision on an erroneous view of a Federal statute. If this court should refuse to reverse that judgment and should refuse to require the Federal law to be properly applied to the facts, then the Bank, although not liable under the law or the facts, is without a remedy in any court. The question presented to this court is not a question of fact, but the question is, did the state supreme court place an improper construction on a Federal statute in deciding a question of fact in a case where a proper construction was material or vital in order to arrive at a correct conclusion?

SEVENTH. The seventh, eighth and ninth assignments of error involve a similar federal question to that raised by the first assignment of error, as to whether or not the trustee in bankruptcy represents the creditors, and whether or not in a

case where the trustee sues to recover a voidable preference, can he recover the entire value of the preference irrespective of the amount necessary to pay the claims of creditors? Can a larger judgment be recovered from the Bank than is necessary to pay the claims of all the other creditors? Can anything be collected to pay fictitious claims that are not supported by any proof? Can anything be collected to pay claims of creditors who had themselves received a voidable preference, and whose claims are not entitled to be filed or allowed in the bankrupt court? Is the trustee a trustee for the creditors? If not, for whom is he trustee? For whose benefit does he collect the trust fund? Is the preference to be collected for the benefit of the bankrupt and returned to him under Section 66b of the Bankrupt Act?

If the right of the trustee to recover in such a case is limited no recovery can be had under the evidence in this case, in excess of $2,523.67, with interest and costs.

These are questions that were raised and argued in the state supreme court. They were decided adversely to the plaintiff in error, but no special mention is made of them in the opinion, presumably because the state supreme court in passing on other questions in the case held that the creditor receiving the voidable preference in such case, is absolutely liable for the entire value of the property received without condition or exception. The court expressly so held in holding that the complaint was sufficient under Section 60b of the Bankruptcy Act. The court also in passing on the charge of the trial court, with reference to creditors of the same class and the meaning of the word preference, apparently gives the statute the same construction. These are all Federal questions which are raised by the record in this case and which give this court jurisdiction to review the judgment.

The decisions of this court are numerous that in such a case this court has jurisdiction on a writ of error issued to review the judgment of a state court.

Factors and Traders Insurance Company v. Murphy, 111 U. S. 738; 28 L. ed. 582.

Traer v. Clews, 115 U. S. 528; 29 L. ed. 467.

Dimock v. Revere Copper Co., 117 U. S. 559; 29 L. ed. 994.

Palmer v. Hussey, 119 U. S. 96; 30 L. ed. 362.

Winchester v. Reiskell, 119 U. S. 450; 30 L. ed. 462.

Williams v. Heard, 140 U. S. 529; 35 L. ed. 550.

Dushane v. Beall, 161 U. S. 513; 40 L. ed. 791.
McCormick v. Market National Bank, 165 U. S. 538; 41 L. ed. 817.
Farmers and Merchants Ins. Co. v. Dobney, 189 U. S. 301; 47 L. ed. 821.
Crawford v. Burke, 195 U. S. 176; 49 L. ed. 147.
Kaufman v. Tredway, 195 U. S. 271; 49 L. ed. 190.
Thompson v. Fairbanks, 196 U. S. 516; 49 L. ed. 577.
Humphry v. Tatman, 198 U. S. 91; 49 L. ed. 956.

The above are all cases in which this court sustained its jurisdiction on writs of error issued to review judgments of state courts. Most of these cases are suits in which questions arose as to rights of parties under bankrupt acts. Several of the cases are suits by trustees in bankruptcy to recover alleged preferences and some of the cases, including the two recent cases of *Kaufman v. Tredway,* 195 U. S. 271, and *Humphry v. Tatman,* 198 U. S. 91, are such suits, in which judgment in the state court was rendered in favor of the trustee and against the creditor receiving the alleged preference where the judgments were reversd in this court on writs of error sued out by the defendants in the state courts.

In the case of *Nutt v. Knut,* decided by this court January 2, 1906, the court said: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States, may be fairly held within the meaning of Section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

Numerous authorities are there cited in support of this proposition, and cases tending to sustain a contrary view were disapproved.

This is a motion by the defendant in error to dismiss the writ on the ground that this court has no jurisdiction to determine or pass upon the questions involved. There is not joined with the motion any motion under Rule 6, to affirm, on the ground that although the court has jurisdiction, that the judgment was manifestly right.

We therefore do not consider it either necessary or proper at this time, or in this brief, to cite authorities or make any argument on the question of the correctness of the decision of the state supreme court on the Federal questions involved, further

than to merely call attention to what those questions are.

Respectfully submitted,

BURR W. JONES,
JAMES WICKHAM, and
FRANK R. FARR,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

No. 163

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

EAU CLAIRE NATIONAL BANK,

Plaintiff in Error,

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, A BANKRUPT,

Defendant in Error.

Petition, Affidavit, Motion and Notice for Certiorari for Diminution of Record.

BURR W. JONES,
JAMES WICKHAM AND
FRANK R. FARR,

Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

No. 511

EAU CLAIRE NATIONAL BANK,

Plaintiff in Error,

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, A BANKRUPT,

Defendant in Error.

(PETITION)

To the Honorable Justices of the Supreme Court of the United States:

The Eau Claire National Bank, the plaintiff in error above named, respectfully shows to the Court that the transcript certified up by the Clerk of the Supreme Court of the State of Wisconsin is incomplete, in this, to wit, that there is omitted from said transcript a certain certificate of the Supreme Court of the State of Wisconsin, certifying to certain Federal questions that were raised in, and decided by, said State court, which certificate has been signed by Honorable John B. Cassoday, the Chief Justice of said State court, and is of record in said Supreme Court of the State of Wisconsin;

Wherefore, the plaintiff in error prays that a writ of certiorari for diminution of the record be issued and directed to the Judges of the said Supreme Court of the State of Wisconsin, commanding them, that searching the records and proceedings in said cause, they forthwith certify to this Court the parts of said records so omitted as aforesaid.

EAU CLAIRE NATIONAL BANK, Petitioner,
By W. K. COFFIN, President.
BURR W. JONES,
JAMES WICKHAM and
FRANK R. FARR,
Counsel for Petitioner.

(AFFIDAVIT)

STATE OF WISCONSIN, } ss.
Eau Claire County, }

James Wickham, being duly sworn, on oath says that he is one of the counsel for the above-named Eau Claire National Bank, plaintiff in error, in the above-entitled cause; that he has read the foregoing petition, and knows the contents thereof, and that the facts stated in said petition are true.

JAMES WICKHAM.

Subscribed and sworn to before me this 9th day of April, 1906.

L. M. MCCUMBER,
Notary Public, Eau Claire County, Wisconsin.

(MOTION)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 511.

EAU CLAIRE NATIONAL BANK,

Plaintiff in Error,

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, A BANKRUPT,

Defendant in Error.

Comes now the said Eau Claire National Bank, plaintiff in error, by Burr W. Jones, James Wickham and Frank R. Farr, its counsel, and suggests diminution of the record in this cause in this, to wit:

That a certificate of the Supreme Court of the State of Wisconsin, signed by Hon. John B. Cassoday, the Chief Justice of said state court, certifying to certain Federal questions that were raised in and decided by said State Supreme Court, is of record in the Supreme Court of the State of Wisconsin, and is omitted from the transcript,—

Wherefore, the said plaintiff in error moves the Court, under Rule 14, to award a writ of certiorari, to be issued and directed to the Judges of said Supreme Court of the State of Wisconsin, commanding them, that searching the record and proceedings in said cause, they forthwith certify

to this Court those parts of the said records so omitted as aforesaid.

Dated, April 9, 1906.

BURR W. JONES,
JAMES WICKHAM, and
FRANK R. FARR,
Counsel for Plaintiff in Error.

(NOTICE)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 511.

EAU CLAIRE NATIONAL BANK,
Plaintiff in Error,

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, A BANKRUPT,
Defendant in Error.

To W. P. Bartlett, C. T. Bundy and Roy P. Wilcox, Counsel for Defendant in Error:

Please take notice that on the 30th day of April, 1906, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the motion of the plaintiff in error for a writ of certiorari for diminution of the record, of which motion the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Dated April 9, 1906.

BURR W. JONES,
JAMES WICKHAM AND
FRANK R. FARR,
Counsel for Plaintiff in Error.

Due service of the annexed and foregoing petition, affidavit, motion and notice, is hereby admitted this 9th day of April, 1906.

WM. P. BARTLETT, C. T. BUNDY AND R. P. WILCOX,
Counsel for Defendant in Error.